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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENDRICKSON BROTHERS, INC.,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MILTON S. GOULD
Counsel of Record

SHEA & GOULD
1251 Avenue of the Americas
New York, New York 10020
(212) 827-3000
Attorneys for Petitioner

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Petitioner Hendrickson Brothers, Inc. ("Hendrickson") respectfully submits this brief, pursuant to Rule 22.5 of the Rules of the Court, in further support of its Petition (the "Petition") that a writ of certiorari issue to review the decision of the United States Circuit Court for the Second Circuit entered in this case on February 16, 1988.

This Brief will discuss two developments since the filing of Hendrickson's Petition – the Fifth Circuit's decision in *Texas* v. *Allen Construction Co.*, 851 F.2d 1526 (5th Cir. 1988) and the filing of the Brief of 42 States as Amici Curie in Support

of Petitioners in *State of Colorado ex. rel. Woodward* v. *Western Paving Construction Co.*, 841 F.2d 1025 (10th Cir. 1988) *vacating* 833 F.2d 867 (1987), *petition for cert. filed* 56 U.S.L.W. 3881 (U.S. June 8, 1988) (No. 87-2027). These two events further compel the grant of Hendrickson's Petition. This Brief also will respond to certain contentions in the Brief in Opposition to the Petition submitted by respondent State of New York (the "State"). Respondent's Brief embraces the Second Circuit's radical evisceration of a statute of limitations defense in antitrust conspiracy actions promulgated in this case.

I.

THE FIFTH CIRCUIT SPECIFICALLY REJECTED THE SECOND CIRCUIT'S HOLDING THAT BIDRIGGING CONSPIRACIES ARE INHERENTLY SELF-CONCEALING.

Hendrickson's Petition established that there is an irreconcilable "conflict among the circuits" whether an antitrust conspiracy may be found to be inherently self-concealing. The Court is respectfully referred to pages 6 through 13 of the Petition. The Fifth Circuit's decision in *Texas* v. *Allen Construction Co.*, *supra*, deepens this conflict by specifically rejecting the Second Circuit's holding that "proof of the conspiracy itself sufficed to prove concealment by the co-conspirators." *State of New York* v. *Hendrickson Brothers, Inc.*, 840 F.2d at 1065, 1084 (2nd Cir. 1988). The Fifth Circuit ruled:

> [W]*e do not agree with the Second Circuit that antitrust violations arising from a bid-rigging conspiracy are always self-concealing.* It is true of any price-fixing conspiracy that "it must remain concealed to be successful." Because price-fixing is illegal, public knowledge of the activity usually ends the agreement. This deceptive aspect of the conspiracy is, in the words of *Hobson*, intended solely to "cover up" the illegal act. Nor is bid-rigging unique because it must "exist for an extended period of time." Every cartel seeks to reap monopoly profits for as long as possible, and because a cartel must limit output, its members have to

> distribute fewer sales among themselves. We cannot see how this aspect of a bid-rigging conspiracy makes it more deceptive than any other price-fixing conspiracy.
>
> *We also are unpersuaded by the Second Circuit's additional argument that bid-rigging is self-concealing because a rigged bid purports to be competitive when in fact it is collusive.* Any price charged for a product or service, whether in the form of a bid or otherwise, purports to be comptetive at least insofar as it purports to be lawful. In short, we cannot conclude that Congress, in writing the Clayton Act's four-year statute of limitations, could have intended for the fraudulent concealment doctrine to apply to every price-fixing case. Hence, we reject the State's contention that because the bid-rigging conspiracy was inherently self-concealing, it need not prove affirmative acts of concealment.

(851 F.2d at 1530-31; emphasis added and footnotes omitted). The Fifth Circuit reversed the grant of summary judgment for defendants and remanded the case to the district court for a determination whether defendants' conduct constituted the requisite affirmative acts of concealment. (851 F.2d at 1534).

The State speculates that had the facts of the instant case been applied to the Fifth Circuit's ruling in *Texas* v. *Allen Construction*, Hendrickson would not be entitled to a statute of limitation defense because Hendrickson's submission of non-collusion affidavits and accommodation bids constitute affirmative acts of concealment under *Texas* v. *Allen Construction*. (State's Brief in Opposition, p. 14). The State misses the point.

In the present case, the jury was not required to find — and did not find — that Hendrickson committed a single affirmative act of concealment. The jury only was required to find that *any* defendant committed an affirmative act of concealment. The court imputed that act against the other defendants. The Court is respectfully referred to the Petition at page 6. Moreover, the

Second Circuit did not hold that Hendrickson committed an affirmative act of concealment. The Circuit Court implicitly ruled that it was not necessary to reach that question since it held that a bidrigging conspiracy is inherently self-concealing.

The Fifth Circuit's decision in *Texas* v. *Allen Construction Co.* highlights that only the Second Circuit has held that an antitrust conspiracy may be found to be inherently self-concealing. We respectfully request that the Court grant Hendrickson's Petition and rule that the Second Circuit's holding – which conflicts with every other Circuit that has ruled on this issue – is without merit and should be reversed.

II.

THE FRAUDULENT CONCEALMENT DOCTRINE IS RIPE FOR CONSIDERATION BY THE COURT

The State contends that there is no apparent need for the Court to grant Hendrickson's Petition since the fraudulent concealment doctrine is well-settled. Thus, the State argues the Second Circuit's holding that the "bid-rigging conspiracy was self-concealing is unexceptional and consistent with the rulings in the other circuits." (State Brief at 11-12).

The State's position conflicts with the recently filed Brief of 42 States as Amici Curie in Support of Petitioners ("Amici Curie Brief") in *State of Colorado* v. *Western Paving Construction Co.*, Index No. 87-2027. (Colorado's Petition for a writ of certiorari is pending before the Court). The Amici Curie Brief vigorously urges the Court to consider the scope of the fraudulent concealment doctrine because the law in the area is "confusing and vague":

> *This Court has not considered the doctrine of fraudulent concealment as it applies to an antitrust bidrigging case. At the appellate and district court levels, case law on the doctrine of fraudulent concealment in antitrust cases is inconsistent, confusing, and vague.* Federal courts have applied three conflicting

> standards to satisfy the concealment element of the fraudulent concealment doctrine: (1) the self-concealing conspiracy standard [adopted in the present case]; (2) the affirmative acts standard; and, (3) the affirmative acts, separate and apart, standard. *Western Paving* adopted the affirmative acts, separate and apart, concealment standard.

Amici Curie Brief at 4; emphasis added.

Contrary to the State's argument, the Amici Curie Brief contends that the Second Circuit's decision is not "unexceptional and consistent" with the other Circuits. Indeed, the Amici Curie Brief states that the Tenth Circuit's decision in *State of Colorado* v. *Western Paving* "can [not] be reconciled with the Second Circuit's decision [in the present case] on the fraudulent concealment doctrine." (*Id.*)

Hendrickson concurs with the conclusion reached in the Amici Curie Brief that current case law applying the doctrine of fraudulent concealment doctrine is "inconsistent, confusing and vague." (*Id.*) Accordingly, Hendrickson urges the Court to grant its Petition and address the substantial issues regarding this "hopelessly confused" body of law. (Amici Curie Brief at 5).

III.

AMFAR'S AFFIRMATIVE ACTS OF CONCEALMENT SHOULD NOT BE ATTRIBUTED TO HENDRICKSON

The Second Circuit ruled that a criminal or tortious act of a defendant to conceal a conspiracy — not known or authorized by a co-defendant — should deprive the co-defendant of its statute of limitations defense, even where there is no finding that the wrongful act is part of the conspiracy alleged. The State alleges that this ruling does not "presen[t] an important issue of federal law which should be determined by this Court." (State's Brief at 9). The Second Circuit's ruling that a criminal act of a defendant, not known by a co-defendant and which

transpires years after the termination of the conspiracy, may waive the limitations defense of the co-defendant is the death knell for that defense in an antitrust conspiracy action. Notably, the State can not cite a single case supporting the Circuit Court's holding.[1]

The State argues that Amfar's acts of concealment, the destruction of documents and a plan to give false testimony to a grand jury, were part of the "reasonable intendment" of the bidrigging conspiracy because, as the Circuit Court found, "the active concealment of the conspiracy was essential to its success." (State's Brief at 10). The State overlooks the fact that the State did not allege — and there was no finding by the jury — that the bidrigging conspiracy included an agreement or understanding that Amfar would destroy information and give false testmony.

Indeed, the trial court's charge to the jury and the special verdict form did not require the affirmative acts to be in furtherance of any common understanding or agreement. The Court is respectfully referred to page 17 of the Petition.

The State's contention that Hendrickson should be denied its statute of limitations defense as a result of Amfar's acts of concealment is particularly pernicious since Hendrickson cooperated with the federal government's investigation of the conspiracy by producing all requested documents. The Court is respectfully referred to pages 58 through 60 of the Appendix to the Petition. Hendrickson's cooperation with the federal investigation of the same conduct at issue in this case should have special significance since the fraudulent concealment doctrine is at issue.

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[1] The State cites *Lutwak v. United States*, 344 U.S. 604 (1953) for the proposition that the acts of one conspirator in furtherance of a conspiracy is attributable to all co-conspirators "regardless of whether they authorized or had knowledge of the acts." (State's Brief at 9). *Lutwak* involved a criminal conspiracy through which aliens gained illegal entry into the United States as spouses of honorably discharged veterans. There is no holding or dicta in *Lutwak* stating that acts to conceal a conspiracy by a defendant, not authorized, agreed to or known by a co-defendant, are attributable to the co-defendant to deny the co-defendant its statute of limitations defense.

A final, troubling aspect of the State's Brief is that it insinuates that Hendrickson was guilty of violating various state and federal criminal statutes in connection with the bidrigging conspiracy. (Hendrickson's acts of concealment "constitute separate criminal acts. . ."; State's Brief at 8; see also State's Brief at 7, 15, ftntes. 7, 13). Hendrickson – unlike its co-defendants – was never indicted or made party to any federal or state criminal proceeding arising out of the conspiracy. However, Hendrickson was tried in this treble damages civil suit together with defendants which had been indicted and convicted of crimes relating to the highway construction contracts involved in this lawsuit. The State's suggestion that Hendrickson's statute of limitations defense should be defeated by innuendo of criminal misconduct is unworthy and must be rejected by the Court.

CONCLUSION

This year alone, the Second Circuit in *State of New York* v. *Hendrickson Brothers*, the Fifth Circuit in *Texas* v. *Allen Construction*, the Sixth Circuit in *Pinney Dock and Transport* v. *Penn Central Corp.*, 838 F.2d 1445 (6th Cir. 1988) and the Tenth Circuit in *State of Colorado* v. *Western Paving Construction Co.* have grappled – and reached conflicting results – with the appropriate standard for applying the fraudulent concealment doctrine in antitrust conspiracy actions. The issues raised in these cases have an enormous impact on all conspiracy actions and are ripe for consideration by this Court. It is therefore respectfully requested that the Court grant the Petition of Hendrickson Brothers, Inc.

September 15, 1988 Respectfully submitted,

MILTON S. GOULD

SHEA & GOULD
Attorneys for Petitioner
Hendrickson Brothers, Inc.
1251 Avenue of the Americas
New York, New York 10020
Telephone: (212) 827-3000